

NO. 83-1547

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In the
Supreme Court of the United States

OCTOBER TERM, 1983

GORDON NOVEL,

Petitioner,

VERSUS

LOUISIANA WORLD EXPOSITION, INC., ET AL.,

Respondents.

BRIEF BY RESPONDENT, LOUISIANA WORLD
EXPOSITION, INC., IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Did not the United States Court of Appeals for the Fifth Circuit properly dismiss petitioner's appeal for failure to prosecute his appeal and for failure to timely file his appellate brief?

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STATEMENT OF THE CASE

There is no special or significant reason why certiorari should be granted in this case. This action was initiated in 1977 by Gordon Novel against the Louisiana World Exposition and the other respondents herein. After a long and contorted process, riddled with delays caused by Novel, the District Court dismissed Novel's case on February 9, 1983.

The original deadline for the filing of Novel's appellate brief in this matter was July 6, 1983. Novel requested and was granted a 30-day continuance, through August 5, 1983. Very near the end of this first extension, on or about August 1, 1983, Novel moved for a second 30-day continuance, and, subsequently, he moved for a third extension of 30 days, until October 4, 1983. On September 26, 1983, the Fifth Circuit denied this third request for an extension.

Novel subsequently attempted to file his brief even though his motion for a third extension had been denied, simultaneously filing a Motion for Leave to File Brief Out of Time. That motion was contested by respondents and denied by the Fifth Circuit; Novel's brief was returned to him unfiled by the Clerk and his appeal was dismissed.

Petitioner now argues that this dismissal, which was completely in accordance with the Federal Rules of Appellate Procedure and the Local Rules of the Fifth Circuit, deprived him of due process rights inherent in the appellate process. However, it is clear that the Fifth Circuit correctly followed all rules applicable to dismissal of an appeal for failure to timely file a brief and failure to prosecute, so that Novel's rights were not infringed by the decision of the Fifth Circuit. Accordingly, Novel presents no question which warrants the grant of a writ of certiorari in this case.

FACTUAL STATEMENT

As discussed at length in the District Court opinion dismissing Novel's action, a copy of which is attached to petitioner's application as Appendix "F," the complaint consisted only of "vague and conclusory allegations that thirteen defendants . . . conspired against him . . . to steal

plaintiff's idea of having a world's fair in New Orleans." (Appendix "F," p. A-13.) The memorandum opinion by Judge Veronica D. Wicker describes the continual delays inflicted on the defendants and the judicial process by Novel during the course of this litigation, and notes that "[i]t is apparent from the complaint and other pleadings filed by plaintiff and the history of the case that Novel's sole purpose was to harass the various defendants and gain public notoriety." (Appendix "F," p. A-17.)

Novel's tactics led the District Judge to dismiss the complaint because petitioner continually refused to clarify the issues involved and failed to prosecute the litigation. As the District Judge pointed out, "Novel has used this record as a sounding board, and as a means to make wild, vague and conclusionary accusations against the defendants." (Appendix "F," pp. A-20 through A-21.) Accordingly, the District Court correctly found "plaintiff's original and amended complaints to be frivolous, and totally without merit." (Appendix "F," p. A-21.)

After dismissal at the trial court level, Novel filed a notice of appeal to the Fifth Circuit. In keeping with Novel's well-established pattern of dilatory tactics, he continually refused to abide by the briefing schedule issued by the Fifth Circuit for processing his appeal. Petitioner allowed the first deadline for filing his appellate brief, July 6, 1983, to pass without submitting the required documents. The second extended deadline, August 5, 1983, passed and still Novel had not filed a brief. On August 25, 1983, the Clerk of Court for the Fifth Circuit wrote to Novel's counsel warning in no uncertain terms that the case would be dismissed if he did not file a motion to be substituted as counsel by September 9, 1983. Novel received a copy of that letter from the Clerk and, thus, cannot deny knowing

the current status of his appeal. (See Appendix "E" to Petition for Writ of Certiorari.)

Even though Novel was aware that the Clerk had expressly warned that the case would be dismissed if the appropriate documents were not received, Novel failed to take any action to see that his appellate brief was filed in a timely fashion. Novel waited approximately one month past the final deadline of September 9, 1983, before filing his appellate brief, accompanied by a Motion to File Brief Out of Time. Because of petitioner's unexplained and inexcusable tardiness, the Fifth Circuit denied the Motion for Leave to File Brief Out of Time, and dismissed his appeal for want of prosecution and for failure of appellant to file his brief within the time fixed by the rules. (See Appendix "A" to Petition for Writ of Certiorari.)

REASONS FOR DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

This case does not present an issue which justifies the granting of a writ of certiorari. Petitioner correctly points out that the rules under which the Fifth Circuit operates governed the dismissal of his case. However, contrary to Novel's contentions, the Fifth Circuit correctly applied those rules in processing and ultimately dismissing the appeal. Novel has not been denied due process, equal protection or any other constitutional or statutory right in the course of his dealings with the Fifth Circuit or any segment of the United States judiciary.

United States Courts of Appeals have rules allowing for dismissal if an appeal is not prosecuted properly. As Novel notes in his Petition for a Writ of Certiorari, the Fifth Circuit rule applicable to this matter is Rule 42.3.2,

which provides that: "In all other appeals when appellant fails to order the transcript or fails to file a brief or otherwise fails to comply with the rules of the Court, the Clerk shall enter an order dismissing the appeal for want of prosecution." Local Rule 42.3.3 is also important: "In all instances of failure to prosecute an appeal to hearing as required, the Court may take such other action as it deems appropriate."

Petitioner was continually late in processing his appeal before the Fifth Circuit. He was allowed every opportunity to continue with his appeal, but dismally failed to achieve even minimal compliance with the Court's briefing schedule. Notwithstanding Novel's blunt assertion to the contrary, his inordinate and unjustifiable delays have severely prejudiced respondents by forcing them not only to defend against this spiteful and meritless claim, but to endure the additional inconvenience and expense occasioned by petitioner's disregard for numerous judicial rules. To have allowed Novel to continue his appeal after his abuse of both the appellate process and his opponents would have constituted an injustice against all involved in this seven-year old debacle masquerading as legitimate litigation. Considering these facts in connection with the Local Rules, the Fifth Circuit properly dismissed Novel's appeal.

The essence of petitioner's argument in support of his contention that the dismissal impinged on constitutional rights is that the Clerk did not dismiss his appeal earlier. Novel argues that "in effect the Clerk can grant an extension, and this is confirmed by his not dismissing the appeal in this case by entering an order required by Rule 42.3.2." (See Petition for Writ of Certiorari, p. 5). Petitioner's obtuse position seems to be that this failure to dismiss the appeal pursuant to Rule 42.3.3 at an earlier

date operated as a *de facto* extension and immunized him from subsequent dismissal. Nothing in the Federal Rules of Appellate Procedure, the Local Rules of the Fifth Circuit, or the practices of either the Fifth Circuit judiciary or Clerk's office supports the contention that it is a common practice to allow an appellant unlimited time to perfect an appeal.

Petitioner is correct that Local Rule 42.3.3 allows the Court broad discretion to take such action as it "deems appropriate." However, Novel utterly fails to demonstrate, even minimally, that the Court did not properly exercise its discretion with respect to the instant dismissal. There was no abuse by the court below; the dismissal was clearly mandated in view of petitioner's abusive and contumacious litigation tactics.

Applicant argues that the Clerk "apparently orally assured appellant that the last day to file his brief after withdrawal of his counsel would be October 7, 1983," but nothing in the record indicates that this assertion is true. To the contrary, the Clerk's communications to petitioner indicate that Novel was continually admonished as to the importance of timely filing the appropriate documents into the appellate record, and repeatedly warned that failure to do so would result in dismissal. This is exactly what did occur, by order of Circuit Judge Thomas Reavley of the Court of Appeals, and in view of the well-documented flouting of the rules by Novel, an assertion that the court below acted improperly is unsupportable.

The dismissal of Novel's appeal was perfectly proper under the Federal Rules of Appellate Procedure as well as the Fifth Circuit's Local Rules. Rule 31 of the Federal Rules of Appellate Procedure sets forth the time constraints for the filing and service of appellate briefs. Rule 31(c) provides

that if the appellant fails to file his brief within this time, or within the time as extended, *the appeal may be dismissed*. Novel's flagrant tardiness clearly justified the denial of his motion for leave to file out of time and the simultaneous dismissal of his appeal under Rule 31(c).

The clear language of the applicable rules indicates that the dismissal of this appeal was both necessary and proper. An examination of other cases decided by the Fifth Circuit establishes that it is far from unusual for an appeal to be dismissed, as was Novel's, for failure to file a brief in a timely manner. See *Swinburn v. First Federal Savings & Loan*, 487 F.2d 338 (5th Cir. 1973) (appellant appearing *pro se*); *Jackson v. Hensley*, 484 F.2d 992 (5th Cir. 1973) (appellant appearing *pro se*); *U.S. v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972); *Turner v. Duval County*, 468 F.2d 919 (5th Cir. 1972) (appellant appearing *pro se*). The appellants in these cases filed no brief at all, unlike Novel who did quite belatedly produce a brief. This difference, however, does not strengthen Novel's position because the Fifth Circuit could properly have dismissed his appeal months earlier.

CONCLUSION

Petitioner was given over seven months to perfect his appeal before the Fifth Circuit; when he failed to do so, the Court of Appeals properly ordered the Clerk to dismiss the appeal for want of prosecution. The denial of petitioner's motion to file his brief out of time was in complete accordance with the Fifth Circuit's usual operating procedures under its Local Rules; Novel simply cannot demonstrate the abridgment of any right. If anything, petitioner apparently received greater indulgence and leniency than the rules would seem to offer the usual appellant. Further,

the Fifth Circuit's handling of this matter was consistent with the Federal Rules of Appellate Procedure and in line with numerous precedents dismissing appeals on similar grounds.

Accordingly, this Petition presents no important issue which would warrant the grant of certiorari and respondents respectfully urge that the Petition be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT,
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CERTIFICATE OF SERVICE

I, Rutledge C. Clement, Jr., counsel for Louisiana World Exposition, Inc., respondent, hereby certify that on this 20th day of April, 1984, copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, were served upon petitioner *pro se* and counsel for respondents by depositing same in the United States mail with first-class postage prepaid, properly addressed to:

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